



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MURANG'A

E.L.C CASE NO. 41 OF 2017

JOHN WAWERU KIARIRE.....PLAINTIFF/RESPONDENT

VS

MAINA NJUGUNA.....1ST DEFENDANT/APPLICANT

KIARIE NJUGUNA.....2ND DEFENDANT/APPLICANT

GITAU NJUGUNA.....3RD DEFENDANT/APPLICANT

RULING

1. This application is brought by way of Notice of Motion dated 3rd February 2017 by the 2nd Defendant/Applicant (hereinafter called the Applicant) seeking the following orders; -

a). Spent

b). Spent.

c). That pending the hearing and determination of the main suit the Court do issue interim injunction restraining the plaintiff, his agents, servants, and or representatives from alienating, selling, advertising for sale, charging disposing, or interfering in whatsoever way with the parcels of land known as Loc 3/Mukuria Scheme/667 and 668.

d). That pending the interpartes hearing and determination of the application the Court do issue conservatory orders restraining any dealings whatsoever in respect to the parcels of land known as Loc 3/Mukuria Scheme/667 and 668.

e). That pending the hearing and determination of the main suit the Court do issue conservatory orders restraining any dealings whatsoever in respect to the parcels of land known as Loc 3/Mukuria Scheme/667 and 668.

2. The application was supported by the affidavit of the applicant sworn on the even date. In summary, the Applicant depones that Loc 3/Mukuria Scheme/667 and 668 were excised from land parcel No. Loc 3/Mukuria Scheme/278 which belonged to his father, one Njuguna Macharia alias Kagera Gitau. That the said land parcel 278 had been the subject of family dispute between his late father and his brothers (Applicant's uncles), the result of which one Uncle David Ndirithi allegedly fraudulently acquired the parcel and caused it to be subdivided into 4 parcels (665, 666, 667 and 668) without the consent of the

owner -Njuguna Macharia. On realizing that the land had been subdivided and transferred to the Respondent, it is averred that Njuguna Macharia applied to the Land Registrar on the 23rd March 1995 to caution the suit properties, claiming purchasers interest, although evidence of the successful registration of the caution has not been annexed. It is alleged that David Ndirithi thereafter fraudulently transferred plots 667 and 668 to the Respondent, hence this application.

3. The applicant avers that he and his family have resided on Parcel 278 presently parcels 667 and 668 since 1961 to the exclusion of the respondent. That the respondent is guilty of fraud for having acquired the suit properties and that status quo be maintained and that the respondent be stopped from disposing the suit properties and or interfering with their peaceful and quiet possession pending the hearing and determination of the suit. That the fraudulent transfer of the suit properties is likely to disinherit him and his siblings because they are the legal heirs/beneficiaries of the suit properties through their father Njuguna Macharia. He has annexed KN1, KN2 and KN3 which are the elders resolution dated 21st June 1986, letter from the District Commissioner to the District Officer Kandara dated 9th February 1988 and application of caution by Njuguna Macharia dated 23rd March 1995 respectively to support his prayer for interlocutory injunction.

4. In opposing the application, the Respondent filed a replying affidavit sworn on the 6th March 2017. In it he deponed that the Notice of Motion as filed by the applicant is bad in law and an abuse of the process of the Court and that he was not privy to the chequered history of disputes surrounding the suit property as alleged by the applicant. He urged this Court to dismiss the application for being unmeritorious. He attached copies of certificates of official searches of the suit properties dated the 29th February 2016 which indicated on the proprietorship section John Waweru Kairire, the respondent herein as the proprietor.

5. It must be noted that this application springs from a plaint filed by the respondent herein on the 28th June 2016 against the 1st, 2nd and 3rd Defendants where he alleges to have acquired the suit properties from one Dirithi Gitau and Wanyui Gitau. In the plaint he seeks the following orders; -

- a). a permanent injunction do issue restraining the defendants, their agents, servants, workmen, relatives or any one claiming through them from trespassing, entering, cultivating or in any way interfering with the plaintiffs land parcel title reference No. Loc 3/Mukuria 667 & 668.
- b). general damages for trespass
- c). Costs of the suit.

6. All the defendants except the 2rd Defendant (the applicant herein) did not defend the suit. In his defense the Applicant raised a counterclaim which is buttressed by rehashed contents like his supporting affidavit. He seeks *inter-alia*, a declaration that he, through his late father is the legal owner of the suit properties through adverse possession having been in possession for the last 31 years. He urged the Court to cancel the respondents' titles and re- issue them in his name.

7. The 1st and 3rd Defendants have not filed any responses to this application.

8. In his written submissions, the learned Counsel for the applicant relied on the celebrated case of ***Giella vs Cassman Brown and Co. Ltd (1973) EA 358*** in urging the Court to grant the interlocutory injunction. He also cited the case of ***Mrao Ltd Vs First American Bank of Kenya Limited & 2 others (2003) KLR, 125*** to show that an infringement of the applicant's right of ownership in the suit properties has occurred through the fraudulent acts of the respondent in the manner in which he acquired the suit properties. That the respondent has never been in occupation of the suit properties and the same has been in the hands of the Applicant and his family.

9. The learned Counsel for the respondent submitted that the respondent acquired the suit properties in

1983 and 1985 respectively from Ndirithi Gitau and is currently the owner as shown by the certificates of official searches dated the 29th February 2016. That on acquisition the respondent took possession and fenced off the land and he has continued in occupation since 1983. That he is a bona fide purchaser for value.

10. I have carefully considered the submissions, rival affidavits and all the annexures to the application and the key question for determination by this Court is whether the applicant is entitled to an interlocutory injunction in this application.

11. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are: that firstly, an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

12. The Court of Appeal in **Mrao vs First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 eK.L.R)** defined a prima facie case in the following terms;

“A prima facie case in a civil application include but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

13. Has the applicant demonstrated a prima facie case with the probability of success? No documents of ownership were presented to this Court to authenticate the applicant’s interest, right or otherwise in the suit properties. This Court would have expected at the very least evidence of ownership of the applicant’s father together with grant of representation to the applicant over his deceased father’s estate, which would give him the mandate to make this application. None of these were tendered in the evidence before this Court. The Applicant cited a Court case to wit; CMCC No 202 of 1995 which was instituted by his Uncles claiming ownership of the suit properties. It would appear that the land Parcel 278 was divided into 4 plots pursuant to a Court order in the above Court case. No documentary evidence was tabled in respect to the decision and whether the decision is still in force or whether it was appealed against.

14. In the case of **Kenya Commercial Finance Company Limited Vs Afraha Education Society & others CA 142 of 1999**, the Court held that a party who has no registered interest in the suit parcel of land cannot be said to have a *prima facie* case with probability of success for the purpose of granting an injunction. It is necessary for the applicant to show that he has a prima facie case for the relief he seeks or that he has a fair question to raise as to the existence of a right, see **Mrao** Case above. The existence or otherwise of a prima facie case is to be adjudged from the affidavit evidence adduced. It would appear that the applicant has not met this test. The allegations of fraud on the part of the respondent has not been proved either. The old adage of he who alleges must proof does holds water in this case. No evidential material was placed before this Court for consideration in that regard for the Court to make any finding.

15. There are a number of issues raised in the rival affidavits of the parties which can only be adjudicated properly by way of a trial; whether the transfer of the suit property was fraudulent, whether the suit properties were owned by Njuguna Macharia, the Applicants father, circumstances of the subdivision of the original parcel of land, the outcome of the CMCC No 622 -Thika, whether its decision was appealed, etc. On the other hand, this Court notes that the respondent too, has not controverted the allegations of fraud levelled against him in respect to the acquisition of the two parcels of land, albeit presenting the copies of the official searches to demonstrate ownership.

16. Is the applicant going to suffer any injury which would not adequately be compensated by an award of damages? The applicant has contented in his written submissions that he has invested heavily in the suit properties by planting tea bushes and constructing temporary structures. That his livelihood is dependent on the produce of the suit lands. The investments in the suit lands are capable of being valued

for purposes of arriving at an amount for compensation. In the circumstance, no evidence has been adduced to show that the applicant will suffer irreparable damage that would not be adequately be compensated by an award of damages.

17. On the balance of convenience, the status quo is unclear. In the circumstance, therefore the balance of convenience tilts to this Court issuing an inhibition to preserve the suit properties until the hearing and determination of the suit. Both parties are contesting that they are in occupation and quiet possession and enjoyment of the suit properties which is a matter for trial in the main suit.

18. In the circumstances, the Application is unmeritorious and is hereby dismissed. However, given the material presented before me, in the interest of justice and in pursuance of the powers granted to me under Section 3A of the Civil Procedure Act and Order 40 (1) of the Civil Procedure Rules, I order as follows; -

a). that an inhibition prohibiting any disposal or dealings on the parcels No.s Loc 3/Mukuria Scheme/667 and 668 be registered on the titles pending the hearing and determination of this suit.

b). Subject to compliance with Order 11, parties be at liberty to fix the matter for hearing at least within the next 45 days of the said ruling.

b). Costs of this application shall abide the outcome of the main suit.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 3RD MAY, 2017.

J. G. KEMEI

JUDGE

Ruling delivered in open Court in the presence of:

Plaintiff/Respondent - Absent

1st Defendant - Present in person

2nd Defendant/Applicant - Njoroge Josphat holding brief for Ms. Musyoka

3rd Defendant - Absent

Susan/Kuiyaki - C/A

J. G. KEMEI

JUDGE